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No. 256.

Supreme Court of the United States

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THE MERCHANTS NATIONAL BANK OF CINCINNATI,
Plaintiff in Error,

versus

THERESA J. WEHRMANN, Executrix, et al,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF OHIO.

Brief for Defendant in Error, Floris A. Sackett, Executrix, etc.

WILLIAM J. SHRODER,
Of Counsel for Floris A. Sackett, Executrix.

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STATEMENT OF THE CASE.

This cause is in this court by writ of error to the Supreme Court of Ohio. It was twice before the latter court, the second hearing being to review the judgment which was entered by the lower court upon a remand to it by the Supreme Court to ascertain additional facts and to enter judgment thereon (see Record, p. 48). The facts upon which the Supreme Court of Ohio made its first decision are found in its report of the case in 69 O. S., pp. 161 *et*

seq. in which is copied on p. 164 the finding of the lower court as printed on p. 37 of the record here (*infra* p. 6). The additional facts on which it made the supplemental decision are found in the printed record, pp. 57, 62. These constitute all the facts that were before that court and, therefore, constitute all the facts before this court.

Finley v. *Whiteley*, 46 O. S., 524-527, bottom.
Building & Loan Assn. v. *Ebaugh*, 185 U. S., 114, 121.
Egan v. *Hart*, 165 U. S., 188.
W. U. Tel. Co. v. *Call. Pub. Co.*, 181 U. S., 92, 103.
Bement v. *Nat. Harrow Co.*, 186 U. S., 70, 83.

The state courts having found all the facts, this finding is conclusive on this court; it will not re-examine the evidence but will take the facts as found in the court below. It follows that it was unnecessary and useless to print the partial evidence in the record, pp. 20 to 37, pp. 53 to 57, Exhibits 56, 58, 63 and 74 (pp. 48 to 52), since this court will not go into the examination of it.

THE FACTS.

In *The Merchants National Bank* v. *Wehrmann*, 69 O. S., 161 to 167, inclusive, the Supreme Court of Ohio found:

> "The litigation in this case had its origin in an agreement signed by some twenty-five persons, of which the following is a copy, omitting signatures:
>
> "We, the undersigned, in consideration of the mutual agreement herein contained, severally agree, as follows:
>
> "First. That we form a syndicate with a capital stock of $320,000, divided into forty shares,

of the par value of $8,000 each, and we will take the shares as subscribed by us.

"Second. With said capital stock it is agreed to purchase a certain tract of land lying in Section No. 33, Columbia township, Hamilton county, Ohio, as per plat hereunto attached, said tract containing 160 acres, more or less, the purchase price for same to be $300,000, payable $100,000 cash, and the balance ($200,000) on ten-year four per cent. ground rent, with privilege of purchase at any time, interest payable quarterly.

"Third. The balance of said capital stock, amounting to $20,000, shall be used for the improvement and development of said land, and for the expenses incidental to the management, control and sale thereof.

"Fourth. The shares of said stock are to be paid for as follows: The sum of $300 per share immediately on signing this agreement; the sum of $2,300 immediately after all shares are taken; the sum of $400 in sixty days after all shares are taken; the balance of $5,000 on each share to be paid out of the proceeds of lots.

"Fifth. After the cost of land, including the cost of making streets, advertising, etc., etc., shall have been paid out of the receipts for the sale of lots, then the receipts will be considered net profits, and shall be divided among the shareholders equally, share and share alike.

"Sixth. Subscriptions to be binding only in case all the forty shares are taken within fifteen days from date thereof. Otherwise said first payment of $300 on each share to be returned.

"Cincinnati, Ohio, January 25, 1889."

The full number of forty shares was subscribed, and certificates of shares in the following form were issued to the subscribers, respectively:

"The Elsmere Syndicate.

"Investment, $320,000. Paid up, $120,000.

"No. Non-assessable.

"This is to certify that ..... is the owner of a 1-40 interest in The Elsmere Syndicate. Tranferable in person or by attorney upon the books of the syndicate at its office in the city of Cincinnati, upon the surrender of this certificate.

"Witness our hands this ..... day of .....

".....

".....

"....."

"Trustees.

"Countersigned,

"....."

"Secretary and Treasurer.

"For value received, ... sells to ..... the interest above mentioned, and authorizes ....., attorney to transfer the same on the books of the company.

"In the presence of

".....

"....."

One F. B. McFarland subscribed for certain shares and purchased others, so that he owned nine shares; and being largely indebted to the Merchants National Bank, he transferred said nine shares to said bank to secure said indebtedness, about the month of January, 1892, which transfer was made to "W. W. Brown, trustee," said Brown

being cashier of said bank. The bank contends that the transfer to Mr. Brown was as collateral security for the debt; while others claim that the transfer made the bank the owner of the shares.

The syndicate was organized, by-laws adopted, officers elected, and the powers of the trustees defined, which included the platting of said property, the leasing and selling thereof, to pay the purchase money and ground rents, and to pay the balance of the funds to the holders of said certificates in proportion to the number of shares held by each.

The syndicate became insolvent in the year 1896, and the persons from whom the land had been obtained foreclosed, and purchased the land, and thereby the syndicate was prevented from further carrying on its business.

After this transfer of the nine shares to Mr. Brown, trustee, the syndicate became largely indebted for improvements, ground rent, interest, and other items intended for the betterment of the property, and its conversion into money.

About July, 1897, an action was commenced by William F. Wehrmann against the parties interested in said syndicate, including W. W. Brown, trustee, and the said bank, seeking to hold the owners of said certificates as partners, and for an accounting. Issues were made up in which said Brown and the said bank denied that they were at any time partners in said syndicate, and averring that said nine shares were held as collateral only.

The case was referred to a master, and he made his report, and the case was taken to the circuit court on appeal, and there tried upon the report of said master in the common pleas, and exceptions thereto, and a finding of

facts and conclusions of law, separately, were made by the circuit court.

The facts found, going to show the liability of said bank, are as follows (being the same finding of facts in Record, pp. 37, 38):

> "First. That what has been called the Elsmere Syndicate was a partnership formed for the purpose of taking the title by lease, with privilege of purchase, of certain lands situated near Norwood, in this county, owned by George W. B. Cleneay and Joseph S. Cleneay, which was under lease to one John Woltz, who quit-claimed his title to Myron A. Spencer, Frank B. McFarlan and James McArdle, Jr., as trustees for said syndicate, on or about the sixteenth day of February, 1889. And that the business of the said syndicate was to subdivide said land into lots, lay out and improve streets, and sell said lots for the profit of the members of the syndicate.
>
> "Second. That the interests of the partners in said partnership were represented by certificates of equal interest of shares, forty in number, numbered consecutively from one to forty and transferable from hand to hand on the books of the said company.
>
> "Third. That the partnership became insolvent, and it became impossible to carry on further the said business, and said partnership was deprived of what remained of said leasehold premises by foreclosure and sale of same, and that it became necessary to file the petition in the court below to wind up the affairs and business of the said partnership, to realize the assets, if any, and to compel the partners to liquidate the indebtedness thereof.

"Fourth. That on June 15, 1896, the interests in said partnership were held by the following named persons, in the proportion set opposite their names, to-wit:

"Myron A. Spencer, two shares.

"Wm. F. Wehrmann estate, Thersea J. Wehrmann, executrix, five shares.

"Merchants National Bank of Cincinnati, Ohio, nine shares.

"James Armstrong's estate, James C. Armstrong, Floris A. Sackett and Isaac B. Matson, executors, three shares.

"Moses Krohn, one share.

"Leopold Feiss, one share.

"Benjamin Pritz, one share.

"Peter G. Thompson, one share.

"Joseph Taylor, one share.

"Richard Hempel, three shares.

"William Bell, eight shares.

"W. B. Kennedy, two shares.

"J. Fred Woltz, one share.

"James McArdle's estate, Margaret McArdle, administratrix, one share.

"Peter J. Dunn's estate, Ella C. Donnell, executrix, one share.

"Being forty in all. That the above named William Bell and W. B. Kennedy are residents of Canada and have not and could not have been served with process herein, and are not subject to the jurisdiction of the court. That the shares standing in the name of Richard Hempel were not his property, and he is not liable thereon, but one of said shares was conveyed to him by John Brokamp, party hereto, and one of the original subscribers to said syndicate, who is liable thereon. That the share standing in the name of Adam T. Voll, No. 39, was one of the five shares

belonging to William F. Wehrmann, and that said Wehrmann was the owner thereof, and that his estate is liable for all assessments thereon, including the amount already paid up by Adam T. Voll, as hereinafter mentioned. That Myron A. Spencer and J. Fred Woltz, above named, and Peter J. Dunn's estate are insolvent and nothing can be made from them. That the others named, including John Brokamp, are liable for the debts of the said partnership and the costs of this case, in proportion to the number of shares held by each, respectively, but the right to contribution against said Myron A. Spencer and J. Fred Woltz and Peter J. Dunn's estate in favor of the other partners is preserved. That the shares standing in the name of W. W. Brown, trustee, are the shares of the Merchants National Bank, orignally held by it as collateral, but transferred to it as owner when they were transferred to said Brown; that when so transferred the notes for which they had been held as collateral were surrendered, and the said shares were entered on the books of the bank as owned by the bank, and so reported to the United States government, and the bank, through its vice-president, took part in the management of the said syndicate and in the effort to preserve its property from sacrifice and loss, and all this was done with the knowledge and acquiescence of the board of directors of said bank."

Upon these facts the Supreme Court of Ohio held as follows (69 O. S., 169, 170):

"The Merchants National Bank of Cincinnati, is a corporation organized under the national banking laws of the United States, and the Els-

mere Syndicate was a partnership consisting of forty shares, each partner holding one or more shares, and each share evidenced by a certificate as shown in the foregoing statement of facts, and which certificates were transferable on the books of the syndicate, and such transfers were intended to make the transferee a partner in the syndicate instead of the transferor, without a dissolution of the partnership.

"The circuit court finds that the bank became owner by transfer of nine shares of this syndicate or partnership, which shares were taken by the bank to secure the payment of a large indebtedness owing to said bank for loans by it made to one of its customers in the usual course of business.

"The bank in accepting said transfer evidently regarded it as a collateral, but it so treated the shares and so transacted the business as to said shares, that the circuit court found that the bank became the owner of the shares, and there was evidence warranting such finding. The case must, therefore, be determined upon the theory that the bank held the shares as owner and not merely as collateral; the purpose of such ownership, however, being to secure the ultimate payment of said indebtedness out of the proceeds of said shares, and to that end it was necessary that the property of said syndicate should be put into such condition as to yield the most money, and this is what the trustees of the syndicate attempted to do; and in so doing debts were incurred, which the syndicate was unable to pay, and after all its property had been consumed in paying said debts, a large debt still remained."

For its conclusion of law the court held (69 O. S., 175):

> "The bank having become the owner of these nine shares, and not having the power to become a partner, it became in legal effect a part owner of the property of the syndicate, which ownership was in its nature several, and the bank, through its trustee, having managed this several interest in connection with the trustees of the other shares as to their interests, the bank became and is liable for its said share of the expenses of purchasing, managing, handling, holding, improving, and disposing of the property. The bank is thus liable for nine-fortieths parts of the debts and expenses remaining after applying the proceeds of the property upon the indebtedness."

The judgment of the Supreme Court of Ohio entered October 27, 1903 (Record, p. 48), was as follows:

> "This cause came on to be heard upon the transcript of the record of the Circuit Court of Hamilton County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same hereby is, reversed; and this cause is remanded to the Circuit Court of Hamilton county, with the instruction to proceed and ascertain the amount of debts and expenses of said Elsmere Syndicate remaining unpaid after the application of the assets of said syndicate to the payment of its debts, including interest, and then render judgment against said plaintiff in error for nine-fortieth parts of said debts and interest remaining so unpaid, and also render judgment against said plaintiff in error for nine-fortieth parts of the costs."

Upon this judgment and mandate sent down to it, the lower (circuit) court entered the decree of June 19, 1904, (pages 57 to 62, inclusive, of the record). This decree made a finding of the debts and liabilities (Record, p. 61) of the Elsmere Syndicate but did not find that any of them were incurred prior to January 15, 1892—it found that nine-fortieths of the said debts and interest remaining unpaid after applying the assets amounted to $9,176.13, for which with interest from December 15, 1901, it entered judgment against the bank.

(Note erratum in Record, p. 41, 15th line, "1890" ought to be "1900.")

This judgment of the circuit court was on February 3d, 1905, affirmed by the Supreme Court of Ohio upon the findings of facts made by the lower court (Record, p. 70).

ON THE QUESTION OF JURISDICTION OF THIS COURT.

Has this court jurisdiction? What title, right, privilege or immunity was specially claimed under a statute of the United States and denied? The record discloses that the action, as commenced in the court of common pleas (Record, pp. 16, 19), was for the winding up of a syndicate partnership, an accounting between its members, and for "such other and further relief as the plaintiff may be in equity entitled to." The bank's answer (Record, p. 19) did *not* claim any federal immunity. From the judgment of the court of the first instance, an appeal to the circuit court was taken by the bank and upon the trial *de novo* (the parties allowing the trial there to be had on same pleadings), the answer contained the same allegations al-

though amendable in that court. The findings and judgment of the court are on pp. 37 *et seq.*, Record (*supra*, p. 6). The first protest against the power of the bank as a corporation under the "banking laws of the United States" appears in the motion for a new trial (Record, pp. 45, 46) where as the fourth ground it is inferentially and generally claimed that there was error in the decision because it was "to the effect that such a corporation has power to be or *become a member of a partnership.*" Thus far there was in the lower courts no *special* claim of immunity under any *statute* of the United States. The petition in error filed in the Supreme Court on September 2, 1902 (Record, pp. 46, 47), in its assignment of errors repeats this objection in the same general form and fails to make any special claim under any statute of the United States. However, the Supreme Court, as already stated in this brief (p. 10, *supra*), did not deny this contention. It decided that the bank had not the power of being a partner or becoming liable as such, but it was a part owner with the syndicate of the property and was in law proportionately liable for the expenses of "purchasing, managing, handling, holding, improving and disposing of the property." At this 1903 hearing of the Supreme Court was the time and occasion for the bank to make its special claim of non-liability by reason of its ownership in severalty; for the opinion (69 O. S., 161) and judgment of the Supreme Court (Record, p. 48) make it conclusive that it considered as before it on the record the very question of the bank's ownership in severalty and its liability by reason thereof. And no party to this action has a right to deny the presumption of hav-

ing considered the record in the same light. This decision *on the construction of the record* did not call upon the court to pass on any federal question; it was wholly independent of such question. And the record shows no special claim of federal immunity declared on this ground; not even by motion for a rehearing. The Supreme Court (Record, p. 48) remanded the cause to the circuit court with special instruction restricting the jurisdiction of the latter court to the ascertainment of specific facts and the rendition of a certain character of judgment. Upon the mandate sent down the circuit court necessarily upon the *same pleadings* ascertained the specific facts and entered the judgment directed (Record, pp. 63, *et seq.*) The only federal claim there set up by the bank was the *general* one (Record, p. 63), the fourth ground in its motion for a new trial that the bank as a corporation under the "banking laws of the United States" could not "under the provisions of said laws be held liable for any proportion of the debts and liabilities of the partnership known as the Elsmere Syndicate." Now inasmuch as this had been passed upon by the Supreme Court and the circuit court had no power to step beyond the directions of the mandate of the Supreme Court (Record, p. 48), this claim to this court, had it even been specially set up, was beyond its cognizance and, therefore, was neither apt nor in time.

The bank taking the judgment for review to the Supreme Court by its second petition in error (June 10, 1904, Record, pp. 64, 65), among the assignments of error again protested its immunity in a similar general manner and form, failing to make any special

claim of immunity under any particular statute of the United States.

To set up a claim of immunity under such a general phrase as "the banking laws of the United States," did not in any way specify which law; it did not advise the Supreme Court which of the original 110 sections of the banking law was relied on; which of the numerous amendments. Such manner of claim would bear an analogy to claims of federal immunity set up generally under mining laws of the United States—a claim uniformly held ineffectual under Section 709.

In fact it can not escape notice that in its grounds for new trial and for reversal, the holding of the Supreme Court that the bank's liability is that of an owner in severalty of the property is distorted, by form of expression, into a liability for a part of a partnership's debts. The Supreme Court of Ohio affirmed the judgment of the circuit court by its judgment entered *February* 3, 1905, and issued its mandate to the circuit court on *February* 6, 1905, to carry this judgment with execution, and on the same day this mandate, with the original papers, were sent to the clerk of the circuit court (Record, pp. 70, 71).

The record thus far discloses that down to the transmission of the cause to the circuit court on February 6, 1905, no special claim of federal immunity had been made by the bank. It has been repeatedly decided that this must be done in order to comply with the requirements of Section 709, U. S. R. S.

In *DeLamar's Nevada G. M. Co.* v. *Nesbett*, 177 U. S., 527, bottom, this court said:

> "To raise a federal question the right must be one claimed under a *particular statute* of the

> United States the validity, construction or applicability of which was made the subject of dispute in the state court; and the decision upon *such statute* must have been adverse to the plaintiff in error."

In *Chapin* v. *Fye*, 179 U. S., 129, it was held:

> "If a party to an action in a state court intends to invoke for the protection of his rights * * * some statute * * * of the United States, he must so declare."

Subsequently on March 7, 1905, on motion of the bank the following certification was entered by the court (Record, p. 71):

> "1. That in the rendition of the judgment of affirmance, it became and was material to determine whether under Sections 5136 and 5137, U. S. R. S., the bank had power to be or become liable for nine-fortieths of the expenses of purchasing, managing, etc., of the property.
>
> "2. That the bank 'claim and ask this court to hold' that under said sections it had no power to be or become liable for any part of said expenses.
>
> "3. That the decision was that the bank could not under said sections become a member of the partnership nor liable for the debts or any part thereof of said partnership, but adjudged that as owner in severalty of nine-fortieths of the property, 'as such owner it did have power under said section to become liable for nine-fortieths of the expenses of purchasing, managing,' etc., etc."

As to the first certification, the construction put by this court upon Section 709, U. S. R. S., makes it essential

to its jurisdiction upon a writ of error, that the immunity be specially claimed *by a party*. Jurisdiction is not conferred by the fact of the state court's considering it material to determine a federal question in arriving at its decision. The Section 709 requires this determination to be adverse to the "immunity specially set up or claimed by either party under *such* * * * statute * * *."

In this certification the court does not attempt to state that in the rendition of the judgment of affirmance on February 3, 1905, any party specially set up or claimed any immunity under the Sections 5136 and 5137; and this certification does not, therefore, fulfill the requirement of Section 709.

The second certification is equally ineffectual to confer jurisdiction on this court. The certificate was made on March 7, 1905, a month after the judgment of affirmance and nearly a month after the Supreme Court had remanded the case (with all the papers) to the lower court to carry the judgment into execution. The certificate, on its face, shows it was on March 7, 1905 (nearly a month after the cause had been sent down to the circuit court and on the day the order allowing the writ of error was filed), that the bank claimed and asked the court to hold that under the particular Sections 5136 and 5137, U. S. R. S., it had no power to become liable for any part of said expenses. This special claim made *on that day* came too late to give this court jurisdiction under Section 709. According to the ruling of this court in *Home for Incurables* v. *City of New York*, 187 U. S., 155, the claim and the certification was too late after the case had ceased to be before the Supreme Court and had been sent down to the circuit court.

In *Powell* v. *Brunswick County*, 150 U. S., 433, 439, it was held that a certificate of the court that a state of case exists for the interposition of the court can not confer jurisdiction to re-examine the judgment below. The office of the certificate in respect to a federal question is to make more certain what is too general and indefinite in the record, but it can not originate the question within the true construction of the statute.

In *Loeber* v. *Schroeder*, 149 U. S., 585, this court said:

> "It is also well settled by the decision of this court that the attempt to raise for the first time a federal question, in a petition for rehearing after judgment, comes too late."

In *Miller* v. *Cornwell R. R. Co.*, 168 U. S., 131, it was held that a suggestion of appearance of a federal question on the record on application for re-argument after the judgment of the trial court is affirmed by the Supreme Court of the state, comes too late.

Pim v. *St. Louis*, 165 U. S., 273.
Sayward v. *Denny*, 158 U. S., 180, 183.
California Powder Works v. *Davis*, 151 U. S., 389, 393.

It was too late to set up the special claim under a federal statute by means of this certification and the jurisdiction of this court on writ of error can not be originated in this manner.

Assuming, *a. g.*, that the bank did set up its federal claim *specially* as required by Section 709, it failed to do so when the cause was the first time in the Supreme Court (in 1903). At that time the Supreme Court was requested to pass upon the bank's power to become liable *as a partner* and it denied such power. The court, however, held that

the record required it to decide the further fact of the bank's ownership in severalty and its liability therefor. And on this record there is no special claim of federal right or immunity made by the bank on this ground. Failing *then* to set up such claim, it was not within Section 709 to make it on the second petition (in 1904) to that court. Nor as already shown could a subsequent certification in March (January, 1905, term), nor a subsequent setting up the claim on March 7, 1905, effect this purpose.

An analogous condition was presented in the record of *Mutual Life Ins. Co.* v. *Kirchhoff*, 169 U. S., 103. According to this case it was for the bank on its first petition in 1903 to have declared specially the protection of the federal statute, which it now claims it made in 1904 on its second petition. The point was embraced in the first decision and the case was before the court at the second trial upon the second supplemental facts ascertained by the circuit court upon the mandate from the Supreme Court.

This court, it is submitted, is without authority to revise the second judgment of the Supreme Court on the ground that the bank was denied any right or immunity properly claimed "in apt time" under Revised Statutes, Section 709.

Western Electric Supply Co. v. *Abbeville Light & Power Co.*, 197 U. S., 299.

In conclusion on this question of the jurisdiction of this court, we claim that it is without jurisdiction—

First. That no claim of protection was made specially as intended by Section 709, Revised Statutes.

Second. That, if held to have been set up in the manner required by this section, it was done only on March

7, 1905, thirty days after the decision and after the case had been remanded to the circuit court.

Third. That the question, having been decided by the Supreme Court in its first decision in 1903, it was too late to invoke the protection of a federal statute against it in the second hearing in 1905.

On the Merits.

The facts of this case are set forth in the statement, *supra*, p. 2. So far as it relates to the bank's connection with the syndicate it is stated (69 O. S., p. 163):

> "One F. B. McFarlan subscribed for certain shares and purchased others, so that he owned nine shares; and being largely indebted to the Merchants National Bank, he transferred said nine shares to said bank to secure said indebtedness about the month of January, 1892, which transfer was made to 'W. W. Brown, trustee,' said Brown being cashier of said bank."

The finding of the court (Record, p. 38) is—

> "That the shares standing in the name of W. W. Brown, trustee, are the shares of the Merchants National Bank, originally held by it as collateral, but transferred to it by the owner when they were transferred to said Brown, that when so transferred the notes for which they had been held as collateral were surrendered and that said shares were entered on the books of the bank as owned by the bank and so reported to the United States Government, and the bank, through its vice-president, took part in the management of said syndicate and in the effort to preserve its property from sacrifice and loss, and all this was

done with the knowledge and acquiescense of the board of directors of said bank."

In the opinion, the Supreme Court (69 O. S., 170) said:

"The circuit court finds that the bank became owner by transfer of nine shares of this syndicate or partnership, which shares were taken by the bank to secure the payment of a large indebtedness owing to said bank for loans by it made to one of its customers in the usual course of business. The bank in accepting said transfer evidently regarded it as a collateral, but it so treated the shares, and so transacted the business as to said shares, that the circuit court found that the bank became the owner of the shares, and there was evidence warranting such finding. The case must, therefore, be determined upon the theory that the bank held the shares as owner and not merely as collateral; the purpose of such ownership, however, being to secure the ultimate payment of said indebtedness out of the proceeds of said shares, and to that end it was necessary that the property of said syndicate should be put into such condition as to yield the most money, and this is what the trustees of the syndicate attempted to do; and in so doing debts were incurred, which the syndicate was unable to pay, and after its property had been consumed in paying said debts, a large debt still remained."

The Supreme Court after deciding in favor of the bank on its claim of *ultra vires* as to partnership, and holding that it was a part owner of the property in question, stated the further fact (69 O. S., 195) that the bank through its trustee managed its several interest in connection with the trustees of the other shares as to their

interests and became liable for its share of the expenses of purchasing, managing, handling, holding, improving, and disposing of the property.

The decision of the Supreme Court to the effect that, by reason of its ownership of the shares, the bank was an owner in severalty of the property, did not present a federal question; it was a decision of the law bearing upon the rights and liabilities of a share owner upon the facts of the case of real property in Ohio.

Kramer v. *Wilson*, 195 U. S., 416.

The state courts found as facts what these expenses were and the proportionate share for which the bank became liable—being the amount of the judgment entered against it.

The question then resolves itself into the following claim of the bank: When a national bank finds that one of its customers has, in the regular course of dealings, become indebted to it, and in order to secure the payment of this debt, in good faith, takes and accepts from him first as collateral and afterwards in satisfaction an equitable undivided part interest in real property, that under Sections 5136 and 5137, United States Revised Statutes, this act is *ultra vires* and of no legal effect whatsoever.

The validity of this proposition in all its parts requires the acceptance of the proposition that it is *ultra vires* to accept such security even as collateral. If it be not *ultra vires* to accept it for collateral, the acquisition of the ownership of it in good faith in furtherance of the same purpose can not reasonably be denounced as *ultra vires*. The validity of holding such a security authorizes the acquiring ownership of it whenever the bank in good

faith considers this step as necessary for the safety of the debt or any part of it.

The facts establish the following points:

1. That the bank became the actual owner of the shares which represented its proportionate ownership of the property.

2. That such ownership was acquired in order to secure a previously contracted debt due it.

3. That it participated with its co-owners in the management of the property.

The acquisition of the shares under these conditions was within the powers of the bank as expressly conferred by the Section 5136, 7th sub., and 5137, 2d and 3d sub., of U. S. R. S.

> *Fleckner* v. *Bank of U. S.*, 8 Wheaton, 351.
> *First Natl. Bank* v. *Natl. Exch. Bank*, 92 U. S., 122.
> *Wylie* v. *Northampton Bank*, 119 U. S., 361.
> *Roebling Sons Co.* v. *First Natl. Bank*, 30 F., 744.
> *Cockrill* v. *Abeles*, 86 F., 505.

These conditions and circumstances were altogether different from those found in the cases wherein the decisions were with the defenses set up by the defendant banks.

In *California Bank* v. *Kennedy*, 167 U. S., 362, and *Concord Natl. Bank* v. *Hawkins*, 174 U. S., 364, the bank's ownership of the shares were as investments. In *Robinson* v. *Southern National Bank*, 180 U. S., 299, and *Rankin* v. *Fidelity, etc., Co.*, 189 U. S., 242, the court found that the bank's holding of the shares was at no time as owner but always as pledgee, and so held out.

But on the other hand, the bank's liability was declared when it was found to have been the actual owner of the

shares, the holding have been originally as a collateral, to secure a pre-existing debt, and the ownership subsequently as an asset further taken to secure the debt.

In *Pauly* v. *State Loan & Trust Co.*, 165 U. S., 606, this court held that the real owner of the shares of the capital stock of a national bank may, in every case, be treated as a shareholder. If the owner transfers his shares to another person as collateral security for a debt he owes him and if with knowledge or by direction of the pledgee the shares are placed in the books of the bank in such way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder and, therefore, liable upon the basis of being a shareholder.

See *Hulitt* v. *Ohio Valley National Bank*, 137 F., 462 (6th Circuit, C. C. A.)

The officers and directors are not in this case chargeable with gross carelessness, much less with actual bad faith, for accepting a collateral of the value which they in good faith attached to it. When the bank caused the shares to be transferred to its cashier as its trustee and in order to preserve its property from sacrifice and loss took part in the management of it by its vice-president, its action was not unusual or at variance with the fair exercise of judgment. It did not enter into any partnership. It assumed its proportion of what may reasonably be incident to the holding and disposing of real property. And it was only this limited responsibility which the Supreme Court of Ohio imposed upon the bank by reason of its ownership. The bank officers by the acceptance of this collateral and by their subsequent action, sought to preserve the bank against the loss of a debt. It certainly constitutes no impeachment of their authority and of the

powers of the bank that the issue of this step was unfortunate. It is from unfortunate results that controversies arise and intervention of courts is invoked. The admission of such an argument would close the courts to all claimants and establish the absolute doctrine that the satisfaction of debt to a national bank by the transfer of any property resulting in further loss is of itself *ultra vires*.

In *National Bank* v. *Exchange Nat. Bank*, 92 U. S., 112, the bank in order to save a loss in one of its transactions involving an outstanding obligation of it, entered into a deal with the holder of this obligation and purchased from him shares of stock to a large amount in order to recover this obligation and in the expectation that the loss would be retrieved in its future handling and disposition of its purchases. Its claim that this purchase was *ultra vires* was denied, it appearing that this stock dealing was not for the purpose of trading solely with a view to profit. The same distinction was made in *Fleckner* v. *Bank of The U. S.*, 8 Wheaton, 351.

In the case at bar the syndicate was not for general trading in land—it was not organized for the purpose of buying and selling generally. Its object and purpose was the handling, improving and selling of a definite and known parcel of real property, present before the parties. Its holdings, its prospects, its realizable property and the value of the same, were as reasonably ascertainable or calculable (if not more so) as many of the ordinary operations of a bank, which involve the determination of the credit of customers or the valuation of securities. The shares were not taken for the purpose of dealing in them. Had the national bank taken a mortgage on a large industrial plant and afterwards become owner of it to save

the loss of the debt—had it then incurred liabilities in its effort to market and dispose of the plant, these transactions though foreign to the ordinary function of a bank, would not be considered *ultra vires*. If a national bank had lawfully acquired an interest in real property for a debt, its purchase of other undivided interests or incumbrances to enable it to manage or dispose of the property would not be *ultra vires*.

Cockrill v. *Abeles*, 86 F., 505.

In *Royal Bank of India*, L. R., 4 Ch., 252, it was held not *ultra vires* for a bank with reference to a property which it was authorized to take and hold as security for a debt, to incur expense in managing and converting it into money in furtherance of this security. The court said (p. 263):

> "Of course, although no banker is authorized to become a partner with merchants or ship owners or builders, or to engage in transactions of that sort, yet he is authorized to lend upon securities of that description, and he is authorized to take every rational course for the purpose of making his securities good and available. In that way he may become liable upon a building contract; in that way he may become liable as a ship owner; in that way he may become liable in respect of matters of freight, or, in fact, in respect of any matters connected with a bill of lading which he holds as a security. *I entirely found my judgment on this, that it is within the scope of an ordinary banking business to make the loans which have been made, and to take the deposit of shares as a security; and when the directors, having done so, afterwards took a rea-*

sonable and bona fide course to realize these securities, they can not now turn around and say that what they did for that purpose was ultra vires, and not justified by their articles of association." [Italics ours.]

We submit that the ownership of these shares by the appellant bank was obtained in the course of dealings within the scope of an ordinary banking business; that it was the exercise of such incidental powers as were necessary to carry on its business of banking; that it was the exercise of its powers of purchasing and holding real estate, for the purpose of security for a pre-existing debt. The liability incurred by such holding was not *in solido* as of a partner, but only proportionate to its partial holding. The amount of it was as a fact found by the state court and by it entered into its judgment which ought to be affirmed.

Respectfully submitted,

WILLIAM J. SHRODER,

Of Counsel for Floris A. Sackett, Executrix.